FILE COPY

FILED
FEB 26 1970
JOHN F. DAVIS, CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1969

No. 1247

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

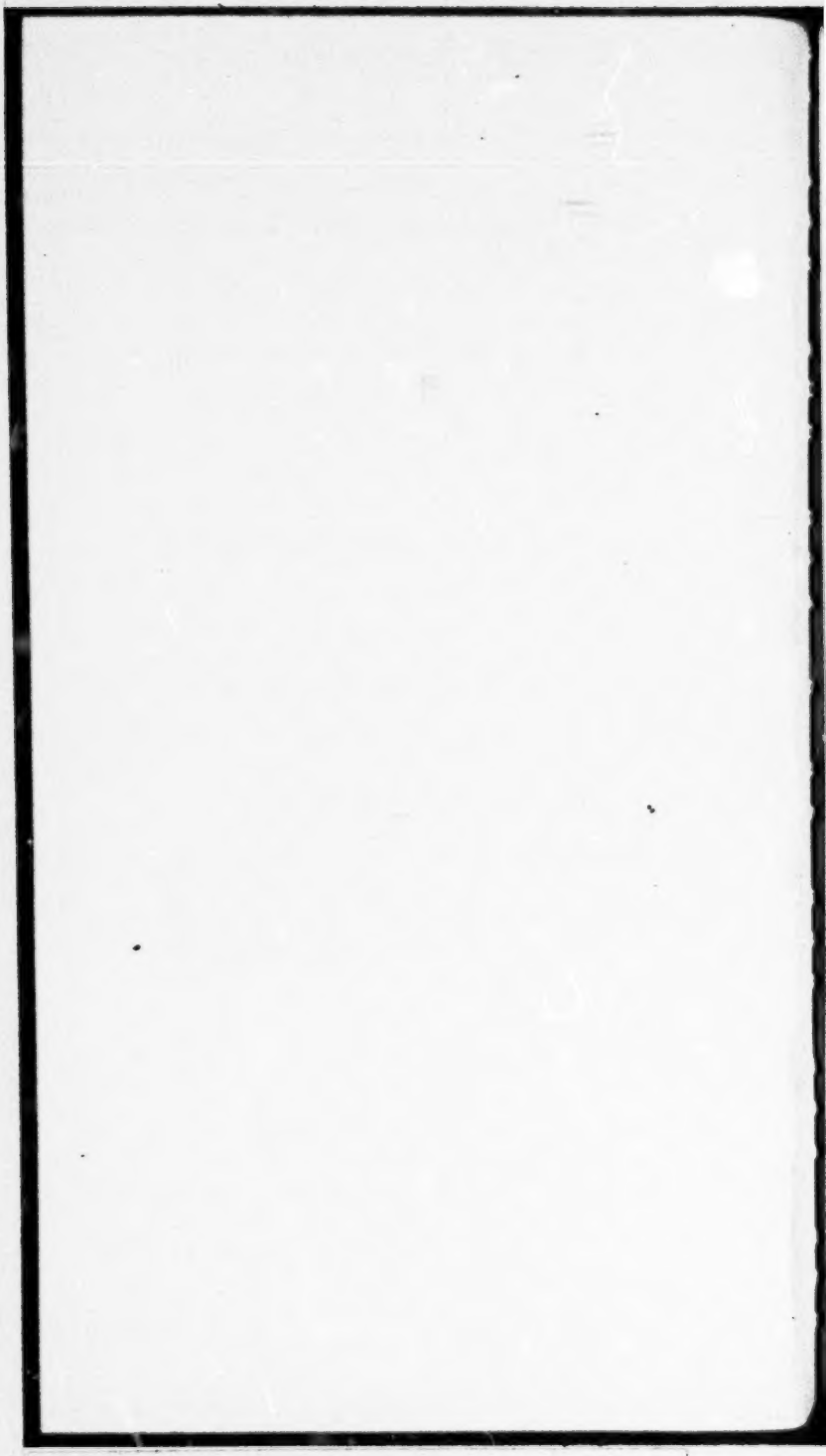
versus

HALL LUMBER SALES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES H. ANDERSON
BYRON D. STRATTAN
1416 Dodge Street
Omaha, Nebraska 68102
Attorneys for Petitioner
Union Pacific Railroad Company

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha



BLEED THROUGH POOR COPY

SUBJECT INDEX

Pages

Opinions Below 1

Jurisdiction 2

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

Question Presented 2

Statutes Involved 3

Statement 3

Reasons for Granting the Writ 7

Conclusion 14

AUTHORITIES

Cases:

New York Cent. R. Co. v. Brown, et al., 274 N. W. 715 7

New York Cent. R. Co. v. Frank H. Buck Co., 34 P. 2d 1012 7

New York Central R. Co. v. Trans-American Petroleum Corp., 108 F. 2d 994 (CCA 7th) .6, 7, 9, 10, 13

New York Cent. R. Co. v. Warren Ross Lumber Co., 137 N. E. 324 ..... 7, 9, 10, 12, 13

North Western Pacific R. R. Co. v. Burchwell, Inc., 349 F. 2d 497 ..... 7, 8, 9, 10

Pennsylvania R. Co. v. Lord & Spencer, Inc., 3 N. E. 2d 231 7

Pennsylvania R. Co. v. Seiter, 22 N. E. 2d 843 7

Pennsylvania R. Co. v. United Collieries, 18 N. E. 2d 1000 7

INDEX — continued

Pages

Acts and Statutes:

28 U.S.C. 1254(1) 2
28 U.S.C. 1337 4
Act of March 4, 1927, c510, 44 Stat. 1447, 49 U.S.C. 3(2) 3, 5, 7, 9, 10, 13
Act of September 18, 1940, c722, 54 Stat. 902, 903, 49 U.S.C. 3(2), 3(3) 3, 5, 7, 9, 10, 13

Opinions of Interstate Commerce Commission:
Matters of Bills of Lading, 52 I.C.C. 671, 721..... 13

APPENDIX

Opinion and Order of The United States District Court, For the Western District of Wisconsin, December 27, 1967..... i-vi
Judgment of the United States District Court for the Western District of Wisconsin, July 22, 1968 .....vi-vii
Opinion of the United States Court of Appeals, Seventh Circuit, December 4, 1969.....vii-xvi
Judgment of the United States Court of Appeals, Seventh Circuit, December 4, 1969.....xvii
Act of March 4, 1927, c510, 44 Stat. 1447, 49 U.S.C. 3(2) .....xviii-xix
Act of September 18, 1940 c722, 54 Stat. 902, 903, 49 U.S.C. 3(2), 3(3).....xix-xxi

BLEED THROUGH POOR COPY

In The

Supreme Court of the United States

OCTOBER TERM, 1969

—o—

No.....

—o—

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

versus

HALL LUMBER SALES, INC.,
Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

Union Pacific Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 4, 1969.

—o—

OPINIONS BELOW

The opinion and order of the United States District Court for the Western District of Wisconsin (R.

19-23)[1] entered December 27, 1967, denying Union Pacific Railroad Company's Motion for Summary Judgment is printed in the Appendix hereto, *infra*, pp. i-vi, and is reported at 278 F. Supp. 468. The judgment of the District Court (R. 24) granting Motion for Summary Judgment by Hall Lumber Sales, Inc., entered July 22, 1968, is printed in the Appendix, *infra*, pp. vi-vii, and has not been reported officially or unofficially. The opinion of the United States Court of Appeals for the Seventh Circuit is printed in the Appendix, *infra*, pp. vii-xvi, and has not yet been officially reported.

—o—

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered December 4, 1969, and is printed in the Appendix, *infra*, p. xvii. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

—o—

QUESTION PRESENTED

Whether the consignee of a shipment of property transported by railroad in interstate commerce by a common carrier is liable for payment of the lawful freight charges for the transportation service rendered

---

1 "R" denotes the "Transcript of Record" as filed in the Court of Appeals.

BLEED THROUGH POOR COPY

where that consignee has directed the carrier to deliver the shipment to another and the carrier has complied with that request, irrespective of any instructions given by such consignee to the carrier to collect the charges from the party to whom it was delivered, unless the diverting consignee is an agent only and has no beneficial interest in the property and unless prior to delivery the diverting consignee advises the delivering line-haul rail carrier in writing of the fact of such agency and absence of beneficial title and the name and address of the beneficial owner of the property.

———o———

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, Act of March 4, 1927, c510, 44 Stat. 1447, 49 U.S.C. 3(2); and Section 5(c) of the Act of September 18, 1940, c722, 54 Stat. 902, 903, 49 U.S.C. 3(2), 3(3) are set forth in the Appendix, *infra*, pp. xviii-xxi.

———o———

STATEMENT

This action was brought in the United States District Court for the Western District of Wisconsin on September 27, 1966, by your petitioner, Union Pacific Railroad Company, a common carrier by railroad in interstate commerce, (herein referred to as "Union Pacific") against Hall Lumber Sales, Inc., the respondent, (herein referred to as "Hall"), for collection of

freight charges due Union Pacific for interstate railroad transportation of a carload shipment of lumber.

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. 1337, this being a claim under an Act of Congress regulating commerce.

The factual basis for Union Pacific's claim is as follows: On July 3, 1964, at Pendleton, Oregon, Union Pacific received a carload shipment of lumber for transportation by railroad in interstate commerce from Pendleton, Oregon, to Beloit, Kansas, subject to the classifications and tariffs then in effect, the provisions, terms and conditions of the Uniform Bill of Lading prescribed by the Interstate Commerce Commission and the statutes of the United States regulating such matters. United Alpine Lumber Company (herein referred to as "United Alpine") was the named consignor and the named consignee of the shipment on the Bill of Lading issued at the time of shipment. On July 8, 1964, while the shipment was in transit between Pendleton, Oregon, and Beloit, Kansas, it was purchased by Hall, and that same date United Alpine, by telegram, directed Union Pacific to divert the car to Hall at McFarland, Wisconsin, to show United Alpine as shipper, to sign "Section 7" of the Bill of Lading and to protect $1.31 rate. On July 10, 1964, Hall gave written direction to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (herein called "Milwaukee Road"), the delivering line-haul carrier, to release the car on arrival at McFarland, Wisconsin, to Waubesa Lumber Company, (herein referred to as "Waubesa"), and to "show

BLEED THROUGH POOR COPY

Hall Lumber Sales, Inc. as shipper on the freight bill, all charges to follow the car, protecting the lowest through rate." Hall had bought the lumber from United Alpine on July 8, 1964, and sold it to Waubesa on July 13, 1964, and owned the lumber at the time of the diversion to Waubesa. At no time either before or after delivery, in writing or otherwise, did Hall advise the Milwaukee Road, or any of the carriers participating in the transportation, that it (Hall) was an agent only; that it had no beneficial interest in the shipment; or the name and address of the beneficial owner. The Milwaukee Road released the shipment to Waubesa on July 15, 1964. The lawful freight charges of $1,079.56 ($1.31 rate from Pendleton to McFarland), plus a reconsignment charge of $7.72, were not paid. Waubesa is bankrupt.

These facts are not in dispute. The sole question presented to the lower courts for decision was and the question presented to this Court is whether, under the above circumstances, Hall as consignee (or reconsignee) is responsible for payment of the freight charges. Union Pacific filed a Motion for Summary Judgment (R. 18) contending that under the terms of the Uniform Bill of Lading and Sections 3(2) and 3(3) of the Interstate Commerce Act, a consignee who exercises control over an interstate railroad shipment by diversion or reconsignment of the Shipment, by such conduct becomes a party to the shipping order, accepts the terms and conditions of the Uniform Bill of Lading, and notwithstanding any agreement to the contrary, said consignee is legally responsible for payment of the

freight charges unless (1) it is acting as an agent only, and has no beneficial interest in the shipment, (2) prior to delivery, it notifies the delivering line-haul carrier in writing of the fact of such agency and the absence of beneficial title, and (3) in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, it has also notified the delivering line-haul carrier in writng of the name and address of the beneficial owner. Union Pacific's Motion for Summary Judgment was denied (R. 19-23). Motion for Summary Judgment made by Hall was granted by order of the court entered July 22, 1968, dismissing Union Pacific's Complaint (R. 24).

The Court of Appeals affirmed the Judgment of the District Court upon the authority of *New York Central R. Co. v. Trans-American Petroleum Corp.*, 108 F. 2d 994 (CCA 7th) holding that a carrier and consignee are free to contract concerning the matter of the consignee's responsibility for payment of the transportation charges and that such freedom is not limited by the Interstate Commerce Act as contended by Union Pacific; that the instruction "all charges to follow the car" in Hall's release order to the Milwaukee Road was a clear expression of Hall's desire that Waubesa be held responsible for the freight charges; and that Hall, therefore, was not responsible for payment of the charges.

———o———

FILTERED THROUGH POOR COPY

REASONS FOR GRANTING THE WRIT

The decisions of the United States Court of Appeals for the Seventh Circuit in the instant case and in *New York Central R. Co. v. Trans-American Corp.* (CCA 7th) 108 F. 2d 994, upon the authority of which the instant case was decided, are directly in conflict with the decision on the same question made by the United States Court of Appeals for the Fifth Circuit in the case of *North Western Pacific R. R. Co. v. Burchwell, Inc.*, 349 F. 2d 497. They are also in conflict with the provisions of Sections 3(2) and 3(3) of the Interstate Commerce Act. These decisions of the United States Court of Appeals for the Seventh Circuit are also in conflict with decisions of the Court of Appeals of New York (*New York Cent. R. Co. v. Warren Ross Lumber Co.*, 137 N. E. 324); the Supreme Court of California (*New York Cent. R. Co. v. Frank H. Buck Co.*, 34 P. 2d 1012, affirmed on rehearing, 41 P. 2d 547), the Court of Appeals of Ohio (*Pennsylvania R. Co. v. United Collieries*, 18 N. E. 2d 1000; and *Pennsylvania R. Co. v. Seiter*, 22 N. E. 2d 843), the Supreme Court of Michigan (*New York Cent. R. Co. v. Brown, et. al.*, 274 N. W. 715); and the Supreme Judicial Court of Massachusetts (*Pennsylvania R. Co. v. Lord & Spencer, Inc.*, 3 N. E. 2d 231).

In the *Trans-American* case, *supra*, and the instant case, the United States Court of Appeals for the Seventh Circuit concluded that the freedom of a consignee who diverts an interstate shipment by rail and of the carrier to contract concerning the payment of

freight charges is not limited by the Interstate Commerce Act. In those two cases, the Court accepted the principle that a consignee exercises a degree of dominion over a shipment when it reconsigns the same but rejected the view that such act of dominion can render a consignee liable for the transportation charges. The Court further concluded in these two cases that "by implication from the consignee's direction to deliver to another and collect freight charges from the other and the railroad's conduct in giving effect to such reconsignment the railroad agreed to accept the liability of the new consignee (if it accept the shipment) in place of the liability which the original consignee would sustain if it accepted the shipment".

The United States Court of Appeals for the Fifth Circuit in the case of *North Western Pacific R. R. Co. v. Burchwell, Inc., supra*, rejected this view entirely. In the *Burchwell* case, the consignee of the interstate rail shipment diverted the shipment to a third party with instructions to "collect the freight charges before delivery". The instructions in the *Burchwell* case, as in the instant case, were silent with respect to agency and beneficial ownership. The carrier there involved delivered the shipment of lumber without collection of the freight charges and sued Burchwell, the consignee who had diverted the shipment, for payment of freight charges. Burchwell argued that the diversion ended its liability for the charges and made the new consignee liable.

In the *Burchwell* case the Court held that where a consignee exercises dominion over an interstate rail

BLEED THROUGH POOR COPY

shipment by directing the carrier to deliver the same to a third person, the diverting consignee thereby becomes obliged to pay the freight charges, and it is not relieved from its obligation to pay these charges merely because it gave instructions to the carrier to "collect the freight charges before delivery". The court in the *Burchwell* case further held that Congress has limited the method by which a consignee who reconsigns a shipment to another may absolve itself from responsibility for payment of freight charges. It was the opinion of the United States Court of Appeals for the Fifth Circuit that Sections 3(2) and 3(3) of the Interstate Commerce Act, interpreted in the light of their history, impose liability for the freight charges on a diverting consignee unless that diverting consignee has given to the carrier of the interstate shipment accurate notice of agency and of the beneficial ownership of the goods. As above noted, such notice was not given the carrier in the *Burchwell* case nor in the case now before this Court. At the time it rendered its opinion in *Burchwell* the Court recognized that there were two irreconcilable lines of decisions dealing with the question of the liability of a consignee who diverts a shipment to another for payment of the lawful freight charges due for the transportation service rendered and that the leading cases on either side of the question were respectively *New York Cent. R. Co. v. Warren Ross Lumber Co., supra,* and *New York Cent. R. Co. v. Trans-American Corp., supra.*

The Court in *Burchwell* determined that Congress in 1940 amended Section 3(2) and added Section 3(3)

to the Interstate Commerce Act to overrule the decision of the United States Court of Appeals for the Seventh Circuit in *New York Cent. R. Co. v. Trans-American*, supra, and adopt the result of the Court of Appeals of New York in the case of *New York Cent. R. Co. v. Warren Ross Lumber Co., supra.*

The question presented in this petition is an issue upon which there has been a conflict between the courts of many jurisdictions for a period of 40 or more years. That this issue is one which arises frequently is clearly evidenced by the number of times the question has reached appellate courts of various states as well as the United States Courts of Appeals.

In an effort to resolve this conflict, especially in view of the Court's decision in *Burchwell* that *Trans-American* was "overruled" by the amendment of Section 3(2) and the addition of Section 3(3) to the Interstate Commerce Act by Congress, Union Pacific appealed this case to the United States Court of Appeals for the Seventh Circuit for resolution; but that Court concluded that it was unable to discover any compelling implication from provisions of the Act in effect at the time *Trans-American* was decided, or from provisions later enacted, inconsistent with the result reached in *Trans-American.*

The public interest requires uniformity in the matter of liability for freight charges. The most obvious reason is to avoid favoring one shipper over another. Carriers are obligated under law to collect in full from the party or parties responsible therefor the lawful

BLEED THROUGH POOR COPY

tariff charges for transportation. With the conflict existing in the law, if jurisdiction over a consignee who diverts a shipment to a third person can be secured only within one of the three states whose district courts are within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, then such consignee may escape responsibility for payment of freight charges. Yet, if jurisdiction over that shipper can be secured in the federal Courts of one of the six states within the jurisdiction of the United States Court of Appeals for the Fifth Circuit or in the state Courts of one of those states above noted in which the state Courts have held for the carriers in cases of the nature here presented to this Court, then the freight charges due from such a consignee may be successfully collected. In this situation, whether a consignee is to be held liable under these factual circumstances may depend entirely upon his or its geographical location in the country and how a carrier discharges its obligation to collect the charges may depend upon where the railroad may obtain jurisdiction over the shipper. This is contrary to the public interest and the conflict should be resolved by this Court.

Carriers handle daily thousands of diversion orders arising from the many complex dealings of today's commercial world. It is not consistent with public policy to require railroad agents and clerks to decipher and decide whether differing phrases coined by various shippers or consignees and written on diversion orders do or do not release a consignor or consignee from liability. Such a requirement would obviously give rise to situations where one shipper might be favored over another,

the very thing Congress and the Commission are attempting to avoid.

A careful analysis of the history of the Uniform Bill of Lading and the Acts of Congress relating to the liability of a consignee for freight and all other lawful charges for the transportation of property by common carrier railroad in interstate commerce clearly demonstates that the contention of Union Pacific Railroad Company in this case as to the liability of such a consignee is correct. Regardless of any agreement to the contrary, a consignee who diverts an interstate rail shipment to a third party may absolve itself from liability only if it notifies the delivering line-haul carrier in writing before delivery of the shipment to the third party that it is acting as an agent only and that it has no beneficial interest in the goods, and the name and address of the beneficial owner. Since no such notice was given in the instant case, the United States District Court for the Western District of Wisconsin and the United States Court of Appeals for the Seventh Circuit have erred in deciding that Hall is not responsible for the payment of the freight charges to Union Pacific.

The majority view of the courts that have dealt with this problem is that if the original consignee diverts the shipment, it is liable for the freight charges because the diversion implies that the consignee is the owner of the shipment.

The Court of Appeals of New York in *New York Cent. R. Co. v. Warren Ross Lumber Co., supra,* the

BLEED THROUGH POOR COPY

leading case in the line of decisions upholding the view urged by Union Pacific in the instant case was decided in 1922, many years before the 1940 amendment of Section 3(2) and the addition of Section 3(3) to the Interstate Commerce Act. The Court in *Ross*, a case in which the facts are strikingly similar to those in this case, said "when it" (the diverting consignee) "wrote the letter directing the delivery without notifying the plaintiff" (the carrier) "that it" (the diverting consignee) "was not the owner of the goods, it acted either as consignee or volunteer. We may not assume that its letter was the act of a meddler. We must, therefore, presume that it wrote as consignee. It follows that it accepted the goods by an act of ownership when it exercised dominion over them by giving directions for their delivery and the plaintiff was justified in treating it as owner of the goods."

The decision in the *Trans-American* case represents a minority and less rational view than the opinions of the courts in the *Ross* and *Burchwell* decisions, which latter two opinions Union Pacific would urge this court to adopt in deciding this case.

As the Interstate Commerce Commission pointed out in *Matters of Bills of Lading*, 52 I.C.C. 671, at page 721, the carrier does not have a responsibility to inquire into the oftentimes speculative commercial transactions between the various shippers who may be a party to a shipment. It is for this obvious reason that Congress amended Section 3(2) and added Section 3(3) to the Transportation Act and the Commission amended the

Uniform Bill of Lading to require that the consignee could protect itself from liability for payment of the lawful freight charges only by complying with the specific conditions set forth in the statutes. Since it is undisputed in this case that Hall did not comply with these conditions imposed by the statutes, it is respectfully submitted the decision of the court below should be reversed.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

JAMES H. ANDERSON
BYRON D. STRATTAN
1416 Dodge Streets
Omaha, Nebraska 68102

Attorneys for Petitioner,
Union Pacific Railroad Company

BLEED THROUGH, POOR COPY

APPENDIX

ORDER

(Filed December 27, 1967)

From the admitted allegations in the pleadings and from the plaintiff's demand to admit or deny, which demand was neither responded to nor objected to, it appears that:

Plaintiff is a common carrier engaged in the business of transporting freight in interstate commerce. Defendant, Hall Lumber Sales, Inc., is and has been located at Middleton, Wisconsin, during the period in issue. On July 3, 1964, a shipment of one carload of lumber was received by plaintiff, consigned by United Alpine Lumber Co., Pendleton, Oregon, to itself, as consignee, at Beloit, Kansas, for furtherance. On July 8, 1964, plaintiff received a telegram from United Alpine Lumber Co. ordering the diversion of the carload of lumber from itself, as consignee, at Beloit, Kansas, to Hall Lumber Sales, McFarland, Wisconsin. The telegram also ordered that "Section 7 of Conditions" be signed so as to make the delivery "without recourse" on the consignor and so as to direct the carrier not to make delivery without receiving payment for the freight charges; the new freight waybill, now showing defendant Hall Lumber Sales as consignee, was so signed. Prior to arrival of the car at McFarland, Wisconsin, defendant Hall Lumber issued a release order releasing the shipment to the Waubesa Lumber Co., McFarland, Wisconsin, and providing "All charges to follow the

car." Following defendant's release order, plaintiff completed delivery to Waubesa Lumber Co. without collection of tariff charges. Waubesa Lumber Co., McFarland, Wisconsin, filed in bankruptcy in 1965 and is no longer in business. Freight charges amounting to $1,079.56 have never been paid.

Plaintiff carrier has now brought this action against defendant Hall Lumber to collect these freight charges.

Plaintiff has moved for summary judgment in its favor, relying principally upon 49 U. S. C. § 3 (2), *Northwestern Pacific Railroad Co. v. Burchwell*, 349 F. 2d 497 (5th Cir. 1965) and *Pennsylvania Railroad Co. v. Pacific Coast Fruit Distributors*, 217 F. 2d 273 (9th Cir. 1954). Defendant resists the motion for summary judgment, relying principally upon *New York Central Railroad Company v. Transamerican Petroleum Corp.*, 108 F. 2d 994 (7th Cir., 1939).

The plaintiff carrier appears to concede that the decision by the Court of Appeals for this circuit in *New York Central Railroad Company v. Transamerican Petroleum Corp.* (hereinafter referred to as *Transamerican*) is contrary to plaintiff's position in the present action. With one reservation to be noted below, I agree. In *Transamerican* the court expressly noted a line of authority which adopts plaintiff's position and the court rejected this line. Subject to the reservation mentioned, I consider that the facts in *Transamerican* which were critical to the holding there are indistinguishable from those in the present action. The holding of the court was: "The consignee . . . here [in a

BLEED THROUGH POOR COPY

position comparable to that of defendant Hall Lumber] gave the carrier written directions to deliver the freight to a third party [in a position comparable to that of Waubesa Lumber] from whom collection was to be made. To us that was an offer which the carrier, by its act of performance, accepted and thus a contractual relation resulted." 108 F. 2d, at 998. Also, the court held that even if the consignee should by the very act of reconsignment be considered to have exercised such control and dominion over the shipment as to render it liable to the carrier (and the court held that this is not the law), it was also true that the consignee had "entered into a contractual relation with the carrier by which it was relieved." 108 F. 2d, at 999. The new contractual arrangement was considered to have superseded and overcome the consequences of the exercise of control and dominion by the consignee, and to have relieved the consignee of liability.

It should be noted that the opinion in *Transamerican* includes these statements:

> "At the time of the delivery, the [third party whose position was comparable to that of Waubesa Lumber] was the owner of said shipments." 108 F. 2d, at 996.
>
> "The defendant's business [that is, the consignee whose position was comparable to that of Hall Lumber] is that of buying and selling gasoline, but it never takes physical possession of the same, but reconsigns such shipments before they arrive in Chicago. It maintains no storage place for gasoline or oil and the plaintiff [carrier] had knowledge of these facts before and at the time the involved transactions occurred." 108 F 2d. at 996.

Similar circumstances are not present here, at least in the record to be considered in passing upon the motion for summary judgment. However, in *Transamerican*, the court clearly based its decision wholly on the theory of a new contractual arrangement between the carrier and the consignee. It was not necessary to the holding that the original consignee (comparable to Hall Lumber) was merely acting as the agent of the reconsignee (comparable to Waubesa Lumber).

Plaintiff's contention is that *Transamerican*, although not since overruled by the Court of Appeals of this circuit, is no longer good law because Congress considered the decision erroneous and amended the Interstate Commerce Act in 1940 for the purpose of repudiating the *Transamerican* rule. 54 Stat. 902 (1940), amending 49 U. S. C. §§ 3 (2), 3 (3). In *Northwestern Pacific Railroad Co. v. Burchwell*, 349 F. 2d 497 (5th Cir. 1965) (hereinafter referred to as *Burchwell*), this view that the effect of the 1940 amendments was to "overrule" *Transamerican* is vigorously asserted. 349 F. 2d 500-501.

It may well be that Congress intended the 1940 amendment to overrule *Transamerican*, but I cannot agree with *Burchwell* that it succeeded.

The 1940 amendment added to 49 U. S. C. § 3 (2) two sentences which refer to shipments "reconsigned or diverted" by a party in a position possibly comparable to that of Hall Lumber here, but apply only "where such shipments are refused or abandoned at ultimate destination [that is, at a destination such as Waubesa

BLEED THROUGH POOR COPY

Lumber]." This is not the situation in the present action.

The 1940 amendment also added to the Act an entire new section which now appears as 49 U. S. C. § 3 (3). Several provisions of 49 U. S. C. § 3 (3) render it inapplicable here; it is sufficient to say that it might have imposed liability upon Hall Lumber in the present situation only if delivery had actually been made to it.

Therefore, despite *Burchwell's* evaluation of the effect of the 1940 amendments, I conclude that *Transamerican* continues as the rule of the Seventh Circuit. But for the single reservation noted early in this opinion, I would be disposed to grant summary judgment not to the plaintiff but to the defendant. The one reservation, however, is that the present record does not reveal whether Waubesa Lumber was acting as the agent of Hall Lumber.

I have already noted that it was not necessary to the decision in *Transamerican* that the original consignee there was acting as the agent of the reconsignee which was the owner of the shipment. However, the court in *Transamerican* may have intended to reserve the question whether the original consignee might remain liable for the shipping charges if it was acting as the principal and if the reconsignee was merely acting as its agent. *Transamerican*, 108 F. 2d, at 999.

The court requests counsel for the defendant herein, within 20 days from the entry of this order, to submit to counsel for the plaintiff a proposed stipulation

with respect to whether at the time of delivery to it Waubesa Lumber was acting as the agent for Hall Lumber. Within 10 days from his receipt of the proposed stipulation, counsel for the plaintiff is to notify counsel for the defendant whether plaintiff is prepared so to stipulate. Should stipulation on the point prove impossible, the court will entertain a motion by defendant for summary judgment, said motion to be supported by affidavit or other appropriate documentation on the presence or absence of the agency relationship. Following plaintiff's response to such a motion, the court will be in a position to determine whether a genuine issue exists as to the fact.

The plaintiff's motion for summary judgment is hereby denied.

Entered this 27th day of December, 1967.

By the Court:

James E. Doyle
District Judge

* * *

JUDGMENT

(Entered July 22, 1968)

This action came on for (hearing) before the Court, Honorable JAMES E. DOYLE, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

BLEED THROUGH POOR COPY

It is Ordered and Adjudged: That the motion of defendant HALL LUMBER SALES, INC., for summary judgment dismissing plaintiff's complaint be and it is granted; that the plaintiff take nothing, that the action be and it hereby is dismissed on the merits, and that the defendant HALL LUMBER SALES, INC., recover of the plaintiff UNION PACIFIC RAILROAD COMPANY its costs of action, to be taxed herein.

Dated at Madison, Wisconsin, this 22nd day of July, 1968.

John R. Adams
Clerk of Court

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1968 April Session, 1969

Appeal from the United States District Court
for the Western District of Wisconsin.

No. 17223

UNION PACIFIC RAILROAD COMPANY,
a corporation
Plaintiff-Appellant,

versus

HALL LUMBER SALES INC.
Defendant-Appellee.

December 4, 1969

Before Knoch, *Senior Circuit Judge*, Fairchild and Kerner, *Circuit Judges.*

Fairchild, *Circuit Judge.* Plaintiff Union Pacific Railroad Company brought an action to recover freight charges from defendant Hall Lumber Sales, Inc. There are no issues of fact. The district court gave judgment for Hall, and Union Pacific appealed.

On July 3, 1964, at Pendleton, Oregon, Union Pacific received a carload of lumber for carriage pursuant to uniform straight bill of lading. United Alpine Lumber Co., the consignor, consigned the car to itself at Beloit, Kansas for furtherance. On July 8, United Alpine directed Union Pacific by telegram to divert the car to Hall at McFarland, Wisconsin, to show United Alpine as shipper, to "Sign Sec. 7" and protect 131 cent rate.

A new waybill was made out, in lieu of the original, showing Hall as consignee as McFarland, and showing consignor's signature on the section 7 non-recourse provision.

On July 10, Hall gave written direction to the Milwaukee Road, delivering carrier, to release the car on arrival at McFarland to Waubesa Lumber and to "Show Hall Lumber Sales, Inc. as shipper on the freight bill, all charges to follow the car, protecting the lowest through rate." We consider this a clear expression of Hall's desire that Waubesa Lumber be held liable for the freight charges.

BLEED THROUGH POOR COPY

The Milwaukee Road released the lumber to Waubesa Lumber Company July 15. Freight charges of $1,079.56 ($1.31 rate from Pendleton to McFarland) and a reconsignment charge of $7.72 were not paid. Waubesa is bankrupt.

Hall had bought the lumber from United Alpine July 8 and sold it to Waubesa July 13.

The question whether United Alpine, the original shipper, successfully avoided liability is not before us. Our question is whether Hall as consignee (or reconsignee) did so.

In 1939, this court decided a case which the district court considered indistinguishable: *New York Cent. R. Co.* v. *Transamerican Petroleum Corp.*[1] We agree. Unless there is a valid reason for not following it, *Transamerican* supports the judgment of the district court.

This court concluded in *Transamerican* that the freedom of the consignee and carrier to contract concerning the matter in issue was not limited by the interstate commerce act. It recognized that a consignee exercises a degree of dominion over the shipment when it reconsigns, but rejected the "*Ross*"[2] view that such act fixes liability upon the consignee. It concluded that by implication from the consignee's direction to deliver to another and collect freight charges from the other and the railroad's conduct in giving effect to such reconsign-

1 (7th Cir., 1939), 108 F2d 994. See Note, 49 Yale L. J. 1457 (1940).

2 *New York Central R. Co. v. Warren Ross Lumber Co.* (1922), 234 N. Y. 261, 137 N. E. 324, 24 A.L.R. 1160.

ment the railroad agreed to accept the liability of the new consignee (if it accept the shipment) in place of the liability which the original consignee would sustain if it accepted the shipment.

Union Pacific argues, in part, that *Transamerican* was wrongly decided, but more particularly that changes in the interstate commerce act and in the provisions of the bill of lading have superseded the principle of that decision.

Union Pacific relies in part upon a 1965 fifth circuit *Burchwell* decision[3] which concluded that amendments adopted by Congress in 1940[4] "appear to have been designed to emphasize that the Transamerican case was wrongly decided."

Unfortunately no provision of the statute nor uniform bill of lading prescribed by the Interstate Commerce Commission deals specifically with the liability of a consignee-owner who sells the shipment while in transit and reconsigns to the buyer, making it evident to the railroad that the buyer is to be liable for the freight charges. We therefore examine the statute and bill of lading provisions to see whether there are compelling implications running counter to *Transamerican*.

We point out, in passing, that reconsignment by Hall to Waubesa did not in this case bring about addi-

---

3 *Northwestern Pac. Railroad Co. v. Burchwell Co., Inc.* (5th Cir., 1965), 349 F2d 497, 500. See Note 40 N. Y. U. L. Rev. 1184 (1965).

4 (amending 49 U. S. C. § 3(2) and 3(3).)

BLEED THROUGH, POOR COPY

tional transportation service nor increase the transportation charges.

(a) Section 7 of the bill of lading provides in part that "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid." This provision has been the same since 1922.[5] It reflects an earlier provision for payment by the owner or consignee plus the prohibition against delivery without payment, which latter conformed to section 3(2) of the interstate commerce act as created by Transportation Act, 1920, 41 Stat. 479, 49 U. S. C. § 3(2). It makes no distinction between the owner or consignee at the time of delivery and the owner or consignee at any other stage of the transaction.

(b) Section 7 provides further that the consignor shall be liable unless the non-recourse provision is signed and the carrier makes delivery without collection. This provision originated in 1919.[6]

(c) Section 7 further provides a procedure by which a consignee who is different from the shipper or consignor, and is not the beneficial owner of the property, may avoid liability for additional transpor-

---

5 In Matters of Bills of Lading, 66 I. C. C. 63.

6 In Matters of Bills of Lading, 52 I. C. C. 671, 720, 721, 740.

tation charges, found, after delivery, to have been due, though not billed at the time of delivery.[7] If such consignee has taken delivery, he is not liable for the unbilled charges if, prior to delivery, he has notified the delivering carrier in writing of his agency and lack of beneficial title. The shipper or consignor is then liable for the addtionial charges. If such consignee reconsigns or diverts the shipment, he is not liable for the additional charges if he has correctly notified the delivering carrier of the name and address of the beneficial owner. The beneficial owner shall then be liable for the additional charges.

Perhaps it is arguable that this implies that a beneficial owner-consignee who reconsigns, as well as a non-owner consignee who reconsigns but fails to give the required notice, is liable for the charges billed but not collected upon delivery as well as the additional charges neither billed nor collected. This provision, however, had its origin in the 1927 amendment to sec-

---

7 "Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges."

BLEED THROUGH POOR COPY

tion 3(2)[8] and existed when *Transamerican* was decided, though not specifically referred to therein.

We think it is reasonable to interpret this provision consistently with the result in *Transamerican, i.e.*: A consignee or reconsignee who takes delivery is liable for the charges then billed even if not collected. The consignee who reconsigned is not liable for such charges, but if there are additional charges beyond those billed, the beneficial owner at the time of delivery is liable for them if proper notice has been given, and if not, the consignee who reconsigned is liable for them.

The legislative history of the 1927 amendment indicates the problem with which Congress was concerned. Under prior case law, the ultimate consignee was compelled to pay the carrier any difference between the full amount of tariff charges required by law and those actually paid, even though the consignee was only a sales agent whose sales price, commission and remittance to his principal were based on the charges paid at the time of delivery.[9] The debates are explicit that the purpose of the amendment was to alter this rule in favor of ultimate consignees who gave notice of their agency.[10]

(d) Section 7 further provides for relief of an

---

8 44 Stat. 1447, 49 U. S. C. § 3(2).

9 See, *e.g.*, *New York Central & Hudson River Co. v. York & Whitney Co.* (1921), 256 U. S. 406.

10 67 Cong. Rec. 12756-62 (1926). Although this amendment was enacted as part of S. 3286, 69th Cong., 2d Sess. (1927), the debates of this section are found in connection with H. R. 12065, 69th Cong., 1st Sess. (1926), which originally contained this provision. Perhaps this explains why the legislative history has not been cited in the cases thus far.

agent consignee from liability for all charges where he has reconsigned or diverted a shipment and the shipment is refused or abandoned at ultimate destination. If the agent has given proper and correct notice, the beneficial owner is liable for all charges and the agent consignee who reconsigned or diverted is not.

This provision stems from a 1940 amendment to section 3(2),[11] after the decision in *Transamerican*. It implies, at least, that a consignee who reconsigns or diverts, but does not give the prescribed notice is liable for all charges if the shipment is refused or abandoned at ultimate destination. To that extent it recognizes the *Ross* principle that the act of reconsignment is an act of dominion from which liability may arise and runs counter to the *Transamerican* theory that the railroad has accepted the new consignee in place of the original one. We find, however, no implication that a consignee who reconsigns or diverts, but does not give the prescribed notice, is liable for all charges if the shipment is accepted at ultimate destination, but the ultimate consignee fails to pay.

(e) Section 7 also provides for a procedure whereby a shipper or consignor who is originally named as consignee may direct delivery to another and shift liability for transportation charges to the latter.[12] If such shipper or consignor notifies a delivering carrier

---

11 54 Stat. 902, 49 U. S. C. § 3(2).

12 "If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at des-

(Continued on next page)

BLEED THROUGH POOR COPY

in writing to deliver the property at destination to another, that the other is the beneficial owner (and if that is the fact), and that delivery is to be made only upon payment of transportation charges; and if delivery is made without payment, the shipper or consignor is not liable but the party to whom delivery is so made shall be liable. The latter shall be liable for charges billed at time of delivery. He shall also be liable for additional charges later found to be due unless he has correctly given notice that he is not the beneficial owner and notice of the name and address of the beneficial owner.

This provision stems from the 1940 amendment,

(Continued from previous page)

tination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consigner shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term 'delivering carrier' means the line-haul carrier making ultimate delivery."

creating section 3(3).[13] So far as it goes, liability of the beneficial owner delivery to whom is directed by the shipper or consignor who is also consignee is predicated upon the making of delivery to such beneficial owner, and it neither expresses nor implies an answer to our problem where the person delivery to whom is directed reconsigns to another.

The only legislative discussion of section 3(3) indicates that it was designed to relieve consignors who consign to themselves and later reconsign where instructions to the carrier to collect before delivery are disobeyed.[14]

We are unable to discover any compelling implication, either from provisions in effect at the time *Transamerican* was decided, or from provisions later enacted, inconsistent with the result in *Transamerican.*

This was the conclusion reached by the district court. We are not persuaded that *Transamerican* should be overruled, and the judgment is affirmed.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

13 54 Stat. 903, 49 U.S.C. § 3(3).

14 Hearings on H. R. 5726 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess. 4-5, 7-9, 18, 20-22 (1939). *E.g.*, at 18: "Now, that particular paragraph [1927 amendment to 3(2)] is a consignee matter. The bill you have before you is a consignor matter . . ." Here again these hearings occurred in connection with a bill later superseded by S. 2009, 76th Cong., 3d Sess. (1940). It is noteworthy that while the Interstate Commerce Commission originally denied a non-recourse provision for consignor-shippers who reconsign, *In the Matters of Bills of Lading*, 52 I. C. C. 671 (1919,) they had changed their view at the time of these hearings. *Hearings* at 4 (letter from the Chairman of the Legislative Committee of the I. C. C.).

BLEED THROUGH POOR COPY

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Thursday, December 4, 1969

Before

Hon. Win G. Knoch, *Senior Circuit Judge*
Hon. Thomas E. Fairchild, *Circuit Judge*
Hon. Otto Kerner, *Circuit Judge*

Appeal from the United States District Court for the Western District of Wisconsin

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Plaintiff-Appellant,

No. 17223 versus

HALL LUMBER SALES, INC.,
Defendant-Appellee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

Act of March 4, 1927, c510, 44 Stat. 1447, 49 U.S.C. 3(2)

* * *

That paragraph (2) of section 3 of the Interstate Commerce Act, as amended, is amended to read as follows:

"(2) No carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: *Provided*, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the

BLEED THROUGH POOR COPY

delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within the period provided in paragraph (3) of section 16. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this paragraph. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within the period provided in paragraph (3) of section 16."

* * *

Act of September 18, 1940, c722, 54 Stat. 902, 903, 49 U.S.C. 3(2), 3(3)

SEC. 5:

* * *

(c) Paragraph (2) of such section 3 (which requires payment of charges prior to delivery of freight, and prescribes certain rules of liability for payment of charges), is amended by adding at the end the following sentences: "On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion

order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges, and an action for the enforcement of his liability may be begun within the same period provided in the case of an action against a consignee who has given erroneous information as to the beneficial owner."

(d) Such section 3 is amended by adding after paragraph (2) thereof the following new paragraph:

"(3) If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad or a delivering express company subject to the provisions of this part, (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except

BLEED THROUGH POOR COPY

that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. An action for the enforcement of such liability either against the party to whom delivery is made or the shipper or consignor may be begun within the period provided in paragraph (3) of section 16, or before the expiration of six months after final judgment against the carrier in an action against either of such parties begun within the limitation period provided in paragraph (3) of section 16. The term 'delivering carrier' means the line-haul carrier making ultimate delivery."

* * *